thousand tons of coal to be delivered to the buyer at $2.75 per ton; and it was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton. Upon these facts the United States Supreme Court decided that there was in effect the evil of personal discrimination against other shippers in this arrangement; and the final decree therefore was that the Chesapeake and Ohio was perpetually enjoined from taking less than its published tariff of freight rates, by means of dealing in the purchase and sale of coal.

The paramount duty of the common carrier is to the public; it must do nothing inconsistent with that obligation; and to carry its own goods at lower rates than it carries those of the shipping public will enable it to market those goods at lower prices than other shippers can make. Indeed it was a fact shown in the record of this case that the Chesapeake and Ohio, as a result of its being a dealer in coal as well as a carrier, had become virtually the sole purchaser and seller of all coal produced along its line of road. As the court points out, the inevitable tendency will be toward such monopoly if the common carrier is permitted both to deal in a commodity and to carry it. As a carrier may reduce or entirely eliminate the profit upon transportation to market in making its calculations as to the margin of profit that it will require in buying and selling the commodity, the result must be that no other person can compete on equal terms with the carrier in his capacity as dealer. The court is content, it seems, to decide no more at present than that the carrier must charge itself in its operations as a dealer with its own schedule rates as carrier; but much of its reasoning, if carried to the logical conclusion, would forbid the railroads to take the inconsistent positions of dealers and carriers. And indeed it seems that the possibilities of evil cannot be eradicated unless the common carrier is forbidden altogether to deal in the commodities which it transports.[1] B. W.

EFFECT OF ESTOPPEL UPON A CONTRACT VOID FOR USURY. — Much of the conflict as to the effect of usury upon a contract is unquestionably due to the differences in the usury statutes in the various jurisdictions. But this will not account for the many irreconcilable decisions in a single state, — in New York, for example, where, in spite of a very explicit statute declaring usurious contracts altogether void,[1] the authorities seem hopelessly at odds. It is believed that the differences in judicial opinion on such an apparently simple point are due to a failure by many courts to distinguish between situations where it is proper to apply the doctrine of equitable estoppel and where it is not. A recent New York case has held that in an action on a note void under the usury statute, the maker may be estopped to set up his defense of usury. *Hungerford Co.* v. *Brigham*, 95 N. Y. Supp. 867. This

[1] This radical principle may be found expressed in Attorney-General *v.* Great Northern Ry., 29 L. J. Ch. 794, and in Hannah *v.* People, 198 Ill. 77.

[1] 1 Rev. Stats. 772, § 5; as amended, Laws 1837, c. 430, § 1.

decision, in holding that a thing absolutely void may be made valid by estoppel, seems to violate the sound principle that the law should override the conduct of parties, and not the conduct of parties, the law.[2] Although the decision finds support in New York[3] and elsewhere,[4] in closely analogous classes of cases the law is well settled otherwise. For instance, contracts void as against public policy cannot become enforceable by estoppel,[5] nor can a married woman, by asserting that she is unmarried, be estopped to show her coverture,[6] nor an infant his infancy.[7] So one representing a contract not to be within the Statute of Frauds is not estopped.[8] The reason given by the courts for the distinction between usurious contracts and other void contracts — that if the estoppel is not allowed, the party for whose protection the statute was passed may find it a sword against him — is precisely as applicable to other classes of void contracts as to which the law is settled beyond dispute.

We might conceivably, however, shut our eyes to the technical impropriety of the present decision if in no other way could the deserving plaintiff recover adequate damages, on the ground that, after all, the common law court, in allowing an estoppel at all, is using this equitable device to work out a just result. But we are saved the necessity for this departure from logic, for the plaintiff, even if he fails on the usurious obligation, has several courses open to him. First, a usurious note is often given, as in the principal case, as security for, or payment of, an antecedent indebtedness, and if the law should declare the note unenforceable, it would forthwith revive the old claim.[9] Or if the note were taken for present value, there would be a quasi-contractual recovery of the amount given.[10] Further, in almost any case where, because of a controlling rule of law, the estoppel could not be set up, the courts would strain the language or conduct relied upon as a misrepresentation in order to give an action of deceit against the fraudulent person. As a general rule, then, there seems no good reason for allowing an estoppel to make valid a void contract. To this rule there is only one well-recognized exception. If a contract may be entered into either innocently or in a way that according to a statute will vitiate the resulting contract, an estoppel may be raised against one who, though in fact using the improper way, has represented that he used the other.[11]

Some courts would support the present decision by asserting that the statute, though saying "void," really means "voidable at the election of the defrauded party." This may, in many cases, be a proper construction of the statute;[12] but where the statute is as clear and unequivocal as the one upon which the present case turns, the legislature and not the courts should give the remedy.

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[2] National Granite Bank *v.* Tyndale, 176 Mass. 547.
[3] Payne *v.* Burnham, 62 N. Y. 69; but *cf.* Veeder *v.* Mudgett, 95 N. Y. 295, 310, 311.
[4] Henry *v.* McAllister, 99 Ga. 557; *contra*, Chamberlain *v.* M'Clurg, 8 Watts & S. (Pa.) 31.
[5] Langan *v.* Sankey, 55 Ia. 52; Brown *v.* First Nat. Bank, 137 Ind. 655.
[6] Lowell *v.* Daniels, 2 Gray (Mass.) 161; Solomon *v.* Garland, 2 Mackey (D. C.) 113.
[7] Sims *v.* Everhardt, 102 U. S. 300. And see 11 HARV. L. REV. 199.
[8] Brightman *v.* Hicks, 108 Mass. 246.
[9] Pollard *v.* Scholy, Cro. Eliz. pt. i. p. 20.
[10] Pullman's Car Co. *v.* Transportation Co., 171 U. S. 138.
[11] Veeder *v.* Mudgett, 95 N. Y. 295; Mutual Life Ins. Co. *v.* Corey, 135 N. Y. 326; Smith *v.* Weeks, 65 Vt. 566.
[12] *Cf.* Ewell *v.* Daggs, 108 U. S. 143.